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No. 82-729

IN THE

Supreme Court of the United States

October Term, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, *ET AL.*,

Appellants,

v.

TIME INCORPORATED,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 474 ¶ 6, a criminal statute which prohibits all expression through the use of photographs or artwork in the likeness of any portion of any specimen of United States currency, violates the First Amendment of the United States Constitution.

2. Whether 18 U.S.C. § 504, which exempts from the prohibition of § 474 ¶ 6 the publication of certain types of black and white illustrations of currency on the condition, *inter alia,* that such illustrations serve "numismatic, educational, historical or newsworthy purposes", violates the First Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution.

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BRIEF FOR THE APPELLEE

JURISDICTION

Appellee, Time Incorporated ("Time"), hereby adopts the jurisdictional statement in Appellants' Brief ("App. Br.") at 1.[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal statutes involved here, Title 18, U.S.C. § 474 ¶6 and § 504, are provisions of Chapter 25 of Title 18, a lengthy and detailed statute which defines and provides for the punishment of offenses against the currency and other official obligations of the United States and foreign governments. The statutes and constitutional provisions are set forth in the Appendix to this Brief.

[1] References to the Joint Appendix are cited as "J.A. "; references to the Jurisdictional Statement filed by the Solicitor General are cited as "J.S. "; references to Appellee's Motion to Affirm are cited as "Mot. to Aff. "; and references to the Appellants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, dated September 9, 1981, are cited as "Mem. in Opp. ".

STATEMENT OF THE CASE

A. The Factual Background.

Time[2] publishes several popular magazines—TIME, FORTUNE, SPORTS ILLUSTRATED, PEOPLE, MONEY, DISCOVER and LIFE—which report news and commentary on a multitude of subjects. As do all of the most popular magazines in this country, Time's magazines make extensive use of color photographs and other artwork to depict ideas and highlight themes expressed in their texts.[3]

Time's editors and art directors have used photographic and other illustrations of portions of United States currency to convey information and ideas to their readers on a wide range of issues. Pictures of money have appeared in Time's magazines, *inter alia,* to symbolize the toll of inflation; to represent the economic interests at stake in a presidential election; and to convey information and editorial opinions on matters ranging from the place of the American dollar in international commercial markets to point-shaving scandals in college basketball. Examples of such illustrations—each of which the Government has challenged as violative of 18 U.S.C. § 474 ¶ 6—are appended to the Complaint. (J.A. 13-23.)[4]

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[2] Appellee hereby adopts the list of parties in Appellants' Brief on the Merits, at i. Time Incorporated is a corporation organized under the laws of the State of New York. Its affiliates and subsidiaries (except wholly owned subsidiaries) are listed in the Mot. to Aff. vi-vii with the following additions: Adelphi Land Investments, Ltd.; American Family Publishers; Lakeshore Cablevision; Primus Investors, Ltd.; Rock-Time Inc.; Subscription Television of Texas; Temple Lumber Company; and TV-CABLE WEEK; and the following deletions: Bartlesville Video Inc.; Cablevision of Durham, Inc.; Champaign-Urbana Communications, Inc.; Colorado Springs Cablevision, Inc.; Menlo Venture Corp.; N.E.W. Media, Inc.

[3] The Government intimates that Time is asking this Court to elevate its editors' and art directors' personal preference for color illustrations to a First Amendment right (App. Br. 15, 32-33). In fact, it is not just Time's preference at issue here. For example, the 20 most popular magazines in the country (by average circulation) all publish with color covers.

[4] The illustrations are described in detail in the Complaint (J.A. 5-7, ¶ 9) and the Affidavit of Frederick A. O. Schwarz, Jr., submitted in support of Time's Motion for Summary Judgment (J.A. 30-35, ¶¶ 10-16).

As a universally understood symbol which can be used to communicate ideas on many matters of contemporary public concern, and to depict phenomena such as inflation and national deficits which are complex and difficult to summarize in words, the image of money is a uniquely versatile and powerful vehicle of symbolic visual expression. Freedom to use it in reporting the news is important to the journalists responsible for the editorial content of Time's magazines.[5]

Whenever an illustration of money has appeared in one of Time's magazines, the currency pictured has been significantly enlarged or reduced in size, discolored or otherwise distorted in appearance, shown only in part, and/or substantially obscured by printed legends or overlaid objects (*see* J.A. 13-23). Each illustration has appeared on only one side of a page, that page generally being of lightweight glossy stock. Since in most cases the expressive quality of such illustrations derives principally from the process of artistic interpretation and distortion, an actual-size, true-color, unembellished picture of a dollar bill—such as anyone could produce for a small charge in a color photocopying machine—is of little use to Time's journalists.

On numerous occasions within the past two decades, Federal law enforcement agents have advised Time that photographs and other artwork published or intended to be published in its magazines, including each of the illustrations appended to the Complaint (J.A. 13-23), violated the prohibitions of Title 18 respecting the publication of pictures of United States obligations. Time's employees have been warned repeatedly by these agents that Time must cease and desist from publishing such pictures. In addition, Time has been warned that its actions would be referred to the United States Attorney

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[5] Explanations of the editorial value of illustrations of money to the editors and art directors of Time's magazines, and facts relating to the decisions to publish some of the illustrations appended to the Complaint, appear in the record below in the Affidavits of Henry A. Grunwald, Editor-in-Chief of Time Incorporated (J.A. 71-79); Gilbert Rogin, Managing Editor of SPORTS ILLUSTRATED Magazine (J.A. 81-85); Ray C. Cave, Managing Editor of TIME Magazine (J.A. 87-93); Rudolph Hoglund, Art Director of TIME Magazine (J.A. 95-99); and Ronald L. Campbell, Art Director of FORTUNE Magazine (J.A. 101-03).

if Time did not cease and desist from further violations. (J.A. 29-35.)

On May 18, 1981, a Secret Service agent complained to a member of Time's legal department that a recent cover of SPORTS ILLUSTRATED Magazine (J.A. 23), which depicted a basketball net filled with hundred dollar bills, violated Federal criminal law. The agent further declared (i) that the Secret Service intended to seize all plates and other materials involved in the production of the SPORTS ILLUSTRATED cover; (ii) that the names and addresses of all individuals and firms involved in the design and preparation of the cover must be delivered to the Service; and (iii) that the agent wished to "interview" a member of Time's management (J.A. 35).

Ten days later Time initiated this action against the Secretary of the Treasury, the Director of the United States Secret Service and others, seeking a judgment declaring that § 474 ¶ 6 and § 504 are unconstitutional on their face and as applied to Time, and enjoining appellants from enforcing or threatening to enforce them.

B. The Statutory Framework.

1. Title 18, U.S.C. § 474 ¶ 6.

Section 474 is unequivocally an anticounterfeiting statute. One of 39 sections in Chapter 25 ("Counterfeiting and Forgery") of Title 18, the section is captioned "Plates or stones for counterfeiting obligations or securities", and its first four subparagraphs deal directly with that subject, separately prohibiting unauthorized possession, use, sale, importation and forgery of plates, stones and similar materials from which Government obligations are made. The seventh subparagraph of § 474 prohibits unauthorized possession of paper similar to that "adopted" by the Secretary of the Treasury for use in the preparation of Government obligations, and paragraph fifth varies the theme only slightly, proscribing possession of an actual counterfeit with the intent to use it.

By contrast, the sixth paragraph of § 474 relates to the manufacture, sale and importation of pictures—without regard to their size, shape, color, composition, or ability to deceive, confuse, or be used in counterfeiting operations. What it

proscribes is the execution, in any manner, of "any engraving, photograph, print or impression" in the "likeness" of United States obligations, or any part thereof. In authorizing the imposition of criminal sanctions, the paragraph does not require that the maker or seller of a "likeness" of currency produce or convey it with an intent to defraud, or intend that it be used in any manner relating to counterfeiting at all.

The net cast by the prohibition of § 474 ¶ 6 is extraordinary in its scope. It does not require that a prohibited "likeness" of currency be true, or even close, to the size or shape of the genuine article. Nor does it distinguish between a "likeness" true to the color of a specimen of currency, and one which is, for example, pink. Similarly, the prohibition applies with equal force to a "likeness" made of wood, aluminum or plastic; *a fortiori,* it equally proscribes "likenesses" printed on newsprint or on tissue paper, and those appearing on paper which resembles in at least some fashion the consistency and appearance of the material used to print currency. Moreover, it equally prohibits "likenesses" printed on two sides, as genuine specimens of currency are, and "likenesses" printed on only one side of a page.

The provision affords no guidance on how good or bad a "likeness" must be to trigger criminal sanctions. Indeed, the statute furnishes no qualifying standards to identify or limit the objects it proscribes—it simply bans all "likenesses".

In addition, the statute proscribes every rendering of "any part" of a specimen of currency. Thus, execution or sale of a picture of the border of a $1,000 bill, and of a picture of a $5 note which is twisted, folded or distorted, are both forbidden, so long as some fragment of the image of currency appears.

Of particular importance for present purposes, paragraph sixth of § 474 admits no distinctions among the various reasons for which a "likeness" of currency might be made, prohibiting alike the "likeness" intended to record human experience, to express an idea or opinion, or to deceive the public. Thus, equally banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent's birthday gift of a $20 bill; a green, six-foot enlargement of the portrait of George

Washington on a $1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, "In God We Trust", on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist's rendering of a "shrinking" dollar bill, borne by a striking worker to epitomize his demand for higher wages in a period of inflation.[6]

Congress's objectives with respect to the prohibition upon illustrations of currency are buried deep in the past; if articulable goals ever existed, they have long since been forgotten. Section 474 is the lineal descendant of Section 11 of "An act to provide Ways and Means for the Support of the Government, and for Other Purposes", ch. 172, 13 Stat. 218, 221, which was enacted by the First Session of the 38th Congress, and signed by President Lincoln on June 30, 1864.[7] The proceedings of the 38th Congress shed virtually no light on Congress's intent with respect to § 11. However, both the text of the Act and its history in the Congress indicate that the primary—and pressing—purpose of the statute was to raise money needed to wage the Civil War.[8]

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[6] Section 474 ¶ 6 has been read by the courts as a flat ban on any likeness being created, regardless of the maker's intent or the likeness's capacity to deceive. *See, e.g., Webb v. United States*, 216 F.2d 151 (6th Cir. 1954) (no capacity to deceive); *Wholesale Vendors of Texas, Inc. v. United States*, 361 F. Supp. 1045 (N.D. Tex.), *aff'd mem.*, 486 F.2d 1402 (5th Cir. 1973) (no intent to defraud); *Wagner v. Simon*, 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd*, 534 F.2d 833 (8th Cir. 1976) (neither intent nor capacity to deceive); *Ex parte Holcomb*, 12 F. Cas. 828, 829 (C.C.D. Minn. 1871) (No. 6,598). The Department of the Treasury and the Secret Service have similarly enforced § 474 ¶ 6 with the same broad approach (even when considered with § 504(1)). (*See* J.A. 29-35, 61-62.)

[7] That "the prohibition contained in § 474 was originally enacted in the 1860's" is confirmed in S. Rep. No. 2446, 85th Cong., 2d Sess. 7, *reprinted in* 1958 U.S. Code Cong. & Ad. News 5268, 5273.

[8] Referred to in both houses of Congress as the "Loan Bill", *see, e.g., Cong. Globe*, 38th Cong., 1st Sess. 3209, 3289 (1864), the Act authorized, *inter alia*, the Secretary of the Treasury to borrow $400,000,000 on the credit of the United States, and to issue bonds or Treasury notes therefor (§§ 1-3, 13 Stat. 218-19); and to receive United States notes or the notes of national banking associations as a "temporary loan" in exchange for interest-bearing certificates of deposit (§ 4, 13 Stat. 219).

Three of the twelve sections of the 1864 Act were penal provisions which defined and provided for the punishment of counterfeiting and forgery of the new Federal obligations, and of Federal obligations generally, §§ 10-12, 13 Stat. 221-22. In virtually identical language, Congress created substantially the same offenses as § 474 now proscribes, in substantially the same order.

The concerns that actually motivated the legislature which enacted § 11 are not recorded. Such evidence as exists indicates that the Loan Bill was hastily drafted by the Secretary of the Treasury, *see Cong. Globe*, 38th Cong., 1st Sess. 3209, 3211 (1864) (remarks of Rep. Hooper), hastily considered by the Congress, and passed under urgent time constraints; indeed, there is reason to doubt that most of the members of Congress which passed the Loan Bill gave any thought to its anti-counterfeiting sections at all.[9]

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[9] The first trace of the 1864 Act is in the records of the House of Representatives for June 7, 1864—twenty-three days before the Act was signed into law—where it is indicated that a bill to provide for the support of the Government (H.R. 540) was reported from the Committee on Ways and Means, and promptly recommitted with the request that the Committee "have leave to report at any time", as "[t]he loan bills expire at the close of the present month, and this is to provide ways and means for the coming fiscal year". *Globe, supra,* at 2787 (remarks of Rep. Hooper). Within two weeks, the bill was reported back, ordered to be printed immediately, and referred to the Committee of the Whole. *Globe, supra,* at 3116.

The House debated H.R. 540 on June 22 and June 23, 1864, focusing primarily on the proposed loan. *Globe, supra,* at 3182-86, 3208-18. The sole allusion to § 11 in the course of the House discussion was an amendment proposed on June 23 by Representative Davis of New York, addressed to the sanctions clause. *See Globe, supra,* at 3209; 13 Stat. 222.

On Friday, June 24, 1864, H.R. 540 was introduced on the floor of the Senate, and referred to the Senate Committee on Finance. *Globe, supra,* at 3219. The Committee considered it only over the weekend. On Monday, June 27, the bill was returned to the floor, passed by the Senate and returned the same day to the House of Representatives, where the Senate amendments were promptly approved. *Globe, supra,* at 3289, 3311, 3351-52. H.R. 540 was signed by the Speaker of the House and the President *pro tempore* of the Senate on Wednesday, June 29, 1864. *Globe, supra,* at 3370, 3399. On July 1, 1864—the first day of the new fiscal year—it was reported to the Senate that President Lincoln had approved and signed H.R. 540 on June 30. *Globe, supra,* at 3481.

With minor changes in language, § 11 was reenacted as § 5430 of the Revised Statutes of 1878, Tit. LXX, ch. 5, Rev. Stat. 1052, and reenacted again as § 150 of the codification of 1909, Act of Mar. 4, 1909, ch. 321, 35 Stat. 1116. As revised, the substance of § 11 made its way through the first three editions of the United States Code; it was reenacted once again with minor changes in phraseology in the 1948 recodification of the penal laws, *see* Act of June 25, 1948, ch. 645, 62 Stat. 706, and has continued in that form to date.

2. Title 18, U.S.C. § 504.

In 1923, Congress modified the ban imposed by § 474 ¶ 6 to authorize certain illustrations of postage and revenue stamps. Act of March 3, 1923, ch. 218, 42 Stat. 1437. Thirty-five years later, apparently in response to the Treasury Department's desire to be rid of an administrative nuisance, *see* S. Rep. No. 2446, 85th Cong., 2d Sess. 5, *reprinted in* 1958 U.S. Code Cong. & Ad. News 5268, 5272, Congress expanded the exception to permit some illustrations of money under conditions that are now set forth in 18 U.S.C. § 504(1). Pub. L. No. 85-921, § 1, 72 Stat. 1771 (1958).[10] In creating this exception, Congress simply adopted precisely the same requirements previously imposed by the Secretary of the Treasury when he granted

[10] The Senate Committee Report states:

> "The Treasury Department receives numerous requests for special permission to use illustrations of paper money and other obligations and securities of the United States for various legitimate purposes. Publishers of textbooks often desire to use illustrations of United States savings bonds and postal money orders, for example, in school textbooks. Collectors of old paper money likewise wish to use illustrations of such money in articles relating to their issue and in collector's catalogs. Historians similarly want to use illustrations of paper money to picture the currency in circulation during a particular historical period." S. Rep., *supra*, at 5.

Curiously absent from the list of "legitimate purposes" was the need of members of the press to report the news. The Committee did note, however, that "[n]ewspapers quite often publish pictures of paper money or checks in connection with news articles, usually because of ignorance of the statutory prohibitions against the use of such illustrations." *Id.*

"special permission" to individual applicants who requested permission to use pictures of money on an *ad hoc* basis. S. Rep., *supra*, at 5-6. Thus, § 504(1) permits the printing and publication of "illustrations" of currency only if such illustrations: (i) are in black and white; (ii) are of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of the matter illustrated; (iii) are for "numismatic, educational, historical, or newsworthy purposes"; and (iv) appear in "articles, books, journals, newspapers or albums".[11]

If anyone in Congress gave any thought to the obvious questions flowing from such legislation, the written record does not reveal it. No definition of the "educational, historical or newsworthy" purposes, for which such "illustrations" are permitted, is set forth in Title 18 or any other Federal law. Nothing in the legislative history of the statute explains why, or if, Congress perceived any basis for believing that illustrations of currency deemed by the Secretary of the Treasury to be "newsworthy" or "educational" might be more or less amenable to use in counterfeiting than any other kind, or explains why the Secretary was deemed competent to decide what is "newsworthy". Nor did Congress explain why black-and-white illustrations of paper money—the front of which is, of course, primarily black and white—were thought to pose less peril to the public than those which are pink, green or any other color.

One thing that is clear is that in enacting the restrictions in § 504(1) the Congress was addressing the "possibility of the *illustrations* being used as an instrument of fraud". S. Rep., *supra*, at 5; H.R. Rep. No. 1709, 85th Cong., 2d Sess. 3 (1958) (emphasis added).

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[11] Section 504(1) further requires that negatives and plates used in making illustrations permitted by that section be destroyed after their final use. Time does not object to this requirement; its concern here is with the statutory prohibitions on the publication of the pictures themselves. We do note, however, that the plates and negatives from which Time's illustrations of currency are printed contain the same distortions and obscuring designs as the finished magazine, and are, therefore, of no use to would-be counterfeiters.

At the same time that it enacted § 504(1), Congress also authorized a broad exemption from § 474 ¶ 6 for motion picture films, microfilms and slides bearing illustrations of currency and other official obligations, without restrictions as to size, color or purpose. Pub. L. No. 85-921, § 1 ¶ 2, 72 Stat. 1771 (1958) (codified at 18 U.S.C. § 504(2) (1976)).[12] The rationale for this exemption was summarized by the Senate Judiciary Committee in a single sentence: "The counterfeiter does not use a motion-picture film, microfilm or slide in the preparation of counterfeits. . . ." S. Rep., *supra*, at 7. It is equally clear, however, that the counterfeiter also does not use a distorted picture of money on the cover of FORTUNE, or the plate or negative used to produce such a distorted picture. Indeed, a color slide of an actual piece of currency (permitted by § 504(2)) in the hands of a counterfeiter is more likely to facilitate counterfeiting than anything created by Time.

C. The Proceedings Below.

On July 21, 1981, Time moved for summary judgment in the district court. Appellants cross-moved for summary judgment on September 9, 1981.

Time's principal claims in the district court were, *first*, that the prohibitions imposed in § 474 ¶ 6 and § 504(1) are impermissibly overbroad, and fail to satisfy this Court's standards for regulatory statutes abridging freedom of expression; and *second*, that § 504 is independently unlawful because it creates a content-based standard for permitted speech, and because it is impermissibly vague in violation of the Due Process Clause.

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[12] Section 504(2) does provide that illustrations appearing on films, microfilms or slides may not be used for advertising purposes (except philatelic advertising). Section 504(1) contains a similar prohibition. The design, execution or distribution of an advertisement "in the likeness or similitude" of any obligation or security of the United States is also independently proscribed in Title 18, U.S.C. § 475. Inasmuch as the issue here exclusively concerns Time's right to use illustrations of money for editorial purposes, the restrictions imposed upon advertisers are not at issue.

In support of its motion for summary judgment, Time submitted several affidavits and exhibits which set forth the pertinent facts underlying the controversy. (*See* pp. 2-3 nn.4, 5, *supra;* J.A. 25-103.) In opposition the Government submitted only a memorandum of law and made no attempt to controvert the factual showing made by Time.[13]

In the district court, the Government argued that § 474 ¶ 6 prohibits illustrations without regard to quality of the likeness or the intent or purpose behind them, but that its restriction on First Amendment rights was no greater than necessary to further the Government's interest in protecting against counterfeiting (Mem. in Opp. at 7-8, 18). The Government's central argument was that it was not compelled to permit a citizen to express himself in precisely the manner he may deem to be most effective and that § 474 ¶ 6 and § 504(1) were constitutional because they affected only the "style" of expression and not the content of the stories appearing in Time's magazines (*id.* 21). These statutes, according to the Government, constituted "reasonable restrictions" designed to ensure that "reproductions of currency which are made cannot be confused with the genuine articles and cannot be of assistance or inspiration to a counterfeiter" (*id.* 18). The Government also denied that § 504's requirements of an "educational, historical, or newsworthy" purpose regulated speech on the basis of content or that they were vague. In the district court the Government did not justify § 474 ¶ 6 and § 504 as necessary to regulate negatives of photographs, nor did it suggest the construction of § 504 it has offered to this Court.

Against the backdrop of principles of First Amendment jurisprudence to which this Court has adhered for more than

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[13] Only in this Court has the Government presented specific facts which it contends demonstrate both the need for the challenged statutes and the reasonableness of the choices made to effectuate the government interest in preventing counterfeiting. As we will demonstrate, the facts now asserted do not provide justification for the virtually limitless sweep of § 474 ¶ 6 or the hopeless jumble that constitutes § 504.

forty years,[14] and the uncontroverted factual showing in the affidavits submitted by Time, the district court held:

(i) that the visual image of money is a "powerful, expressive symbol", and that Time's use of the symbol in its magazines—"to dramatize or illustrate a set of facts, an existing condition, a moral crisis, a course of conduct"—constitutes protected speech (J.A. 138);

(ii) that § 474 ¶ 6 is unconstitutionally overbroad;

(iii) that § 504 creates an unconstitutional content-based standard for permitted speech;

(iv) that § 504 is constitutionally unacceptable as a regulation of the time, place and manner of expression; and

(v) that § 504 is unconstitutionally vague.

On June 18, 1982, the district court entered its Order and Judgment which granted Time's motion, declaring that § 474 ¶ 6 and § 504 are unconstitutional on their face and as applied to Time (J.A. 155-56). At the same time the court denied the Government's motion for summary judgment.

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[14] As the district court noted:

"Where a statute impinges upon protected speech, the burden is on the government to establish the validity of its asserted interest. *Schneider v. State*, [308 U.S. 147,] 161 [(1939)]. The judiciary has an overriding obligation 'to assess the substantiality of the justification[s] offered,' *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 69 (1981), and to ensure that the regulation promotes legitimate governmental ends with minimal intrusion on First Amendment freedoms. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes v.* [*Mayor of*] *Oradell*, 425 U.S. 610 (1976). 'The breadth of the legislative abridgment must be viewed in the light of less dramatic means for achieving the same basic purpose.' *Shelton v. Tucker*, [364 U.S. 479,] 488 [(1960)]. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button*, 371 U.S. 415, 438 (1963). *See Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967)." (J.A. 141.)

SUMMARY OF ARGUMENT

The photographs and artwork that the Government claims are banned by the Federal statutes challenged here are the simplest and strongest arguments that these statutes are unconstitutional, certainly as applied to Time. Whatever may be the lawful reach of a legislative prohibition upon the execution of illustrations of currency, the current statutes, as applied to Time, proscribe distorted, fragmented pictures that have no conceivable capacity to endanger the public welfare, but constitute important editorial material which Time's journalists use to communicate with their readers. Standing alone these examples of what the Government calls contraband could well serve as the sole submission to prove Time's case.

It is simply fantastic to suggest that illustrations depicting George Washington's portrait in a life preserver (J.A. 15), folded oversized notes crammed in a diamond money clip (J.A. 21), or a "landscape" of enlarged and distorted $100 bills beneath open doors (J.A. 39),[15] are the raw materials of counterfeiters. A Federal prohibition of illustrations such as these serves no legitimate government interest. The statutes challenged here constitute an indefensible ban on protected speech.

As Justice Stewart has observed: No "government agency —local, state or Federal—can tell a newspaper in advance what it can print and what it cannot". *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 400 (1973) (dissenting opinion), *quoted with approval in Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 255-56 (1974). Yet, pursuant to a set of illogical classifications grafted upon an indiscriminate prohibition, that is precisely what the statutes challenged in this lawsuit purport to do.

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[15] This photograph was challenged by the Secret Service, because it was in color and was a "photograph" instead of an "illustration" (J.A. 30), and the result was the substitution of a much less effective photograph employing coins, instead of $100 bills, to suggest a cash-rich company (J.A. 41).

Moreover, each statute at issue, § 474 ¶ 6 and § 504, is facially unconstitutional.

Section 474 ¶ 6 is a complete ban on pictures of United States currency without regard to their size, shape, color, composition or ability to deceive anyone. As the district court appreciated, the statute "remove[s] illustrations of money from the national discourse" (J.A. 139). It allows the Government to prevent Time and others from using a powerful and effective symbol to communicate the news to its readers. After almost 120 years, this sweeping ban—drafted in haste, passed under pressing time constraints by a Congress preoccupied by the threat of financial ruin, signed by a President in need of funds to wage a war of union, and routinely reenacted ever since—remains to be examined in the light of the constitutional axiom that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe [a] protected freedom". *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940); *see Gooding v. Wilson*, 405 U.S. 518, 522 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964).

The Government still clings to the theme that it is not compelled to permit a citizen to express himself in precisely the manner he may deem to be most desirable or effective. However, under our Constitution, the Government does not "permit" a citizen to express himself—effectively, ineffectively, or any other way. The fundamental presumption runs in the other direction. In this country a citizen starts out with the right to express himself or herself, effectively or ineffectively, on any subject—ranging from "[w]holly neutral futilities" to the recitation of "Keats' poems or Donne's sermons", *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), *quoted with approval in Cohen v. California*, 403 U.S. 15, 25 (1971) (Harlan, J.)—and to do so in any manner, from "informed and responsible criticism" to speech which is "foolis[h] and without moderation", *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944). In the furtherance of compelling governmental need that right may be subordinated,

but the restraint must be narrow, precise and clear. Here the Government has legitimate goals in the prevention and punishment of counterfeiting, but § 474 ¶ 6 bans speech which can present no conceivable risk to that public interest.

The Government may not, consistent with the First Amendment, forbid the use of a particular symbol to express an idea even if that idea may be stated in another way. *E.g., Spence v. Washington,* 418 U.S. 405, 411 n.4 (1974) (per curiam); *Cohen v. California,* 403 U.S. at 24-26.

The Government now emphasizes two separate interests which it claims render § 474 ¶ 6 unassailable:

> (i) the prevention of counterfeiting and detection of counterfeiters; and
>
> (ii) the preservation of "the integrity of the monetary system".

The Government's claim that the statute is necessary to assist in the detection and investigation of counterfeiting, including a new focus on the negatives and plates used to make illustrations, merely heightens the overbreadth problem. Less restrictive alternatives already exist in Federal statutes (for example 18 U.S.C. §§ 471, 472 and 474 ¶ 4) which allow the Secret Service to prevent the use of plates and negatives from which counterfeits can be made and to arrest counterfeiters before they pass bogus currency to the public. There is no reason to believe the Government's efforts at preventing counterfeiting will be hindered by the absence of § 474 ¶ 6, which is made superfluous by the presence of these other statutes. Moreover, if negatives and plates, rather than the pictures, are the target of the enforcement effort, then those are the materials that should be regulated, without impinging upon the ability to use illustrations of currency.

The further assertion that the Government's "interest in preserving the integrity of the monetary system of the United States extends beyond a concern with counterfeiting" (App. Br. 22) is curious since the Government never identifies any

interest apart from counterfeiting that could conceivably justify regulating pictures of United States currency.[16]

The Government asserts that it owns the design and appearance of its obligations and that such "ownership" gives it some greater power than it would otherwise have to bar speech using that design. Yet parks, streets and sidewalks are presumed to be held open for public expressive activities, *Hague v. CIO,* 307 U.S. 496, 515 (1939) (opinion of Roberts, J.), and the Government's ability to restrict expressive conduct is "very limited", despite its ownership of these places, *United States v. Grace,* 103 S. Ct. 1702, 1707 (1983).

Furthermore, the interest in preserving the currency "for the uses to which it was dedicated" (App. Br. 24 n.16) is not a basis for barring illustrations of currency as a symbol of expression. Such use is not inconsistent with the use to which this "property" has been dedicated. The "integrity" of the Nation's currency system is not at stake in the publication of Time's covers, nor is it at stake when protestors like Gale Wagner create three-foot-long posters of currency, *Wagner v. Simon,* 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd,* 534 F.2d 833 (8th Cir. 1976). Whether or not mutilation of actual Federal Reserve Notes could be prohibited, as mutilation of a public building could be, mutilation of photographs or illustrations of a public building is not punishable for lack of respect for governmental property, and the same holds true for currency.

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[16] To some extent the "integrity" notion seems related to the Government's references to the work of the "Framers of the Constitution" and the status of Federal Reserve Notes as "the lifeblood of the Nation's commercial and economic existence" (App. Br. 16, 23). However, that approach ignores the fact that our Nation's founders had high regard for First Amendment freedoms:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . . They believed that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth; . . . that public discussion is a political duty; and t..at this should be a fundamental principle of the American Government." *Whitney v. California,* 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

The Government admits that it may not punish conduct disrespectful of the currency simply because it is disrespectful. Other than that interest, or the interest in preventing counterfeiting, the Government has given no content to the notion of the "integrity" which is purportedly protected by § 474 ¶ 6.

Section 474 ¶ 6 is a statute that sweeps within its ambit such a broad range of expression protected by the First Amendment that it must be struck down on its face.

The Government next asserts that any constitutional problems with § 474 ¶ 6 are cured because that provision must be read in conjunction with 18 U.S.C. § 504(1) (App. Br. 19, 25). However, the arbitrary requirements for exemption set forth in § 504(1) simply perpetuate the overly broad ban of § 474 ¶ 6. Section 504(1) continues the prohibition of pictures of currency which fail to satisfy a list of requirements—size, color, forum and purpose—that do not reasonably relate to preventing illustrations that might pose a risk to the public welfare. Since all the illustrations of currency at issue here are still prohibited by the statutory scheme, including § 504(1), that section cannot save § 474 ¶ 6.[17]

Wholly apart from its failure to distinguish protected speech from conduct that endangers public safety, § 504 is

[17] The Government's ever-shifting approach throughout this case serves to underscore the serious problems it has defending the statutory scheme. At times, the Government has asserted and then abandoned several arguments, including its reliance on *Wagner v. Simon* (J.S. 7; Mem. in Opp. 13-16) which upheld the constitutionality of § 474; its belief that § 474 ¶ 6 "protect[s] in every way the value and respect for instruments" of the United States (Mem. in Opp. 8; *compare* App. Br. 25); its reliance on the theory that the statutory scheme is required to forestall persons working in the printing business from having "their interest sparked by discovering the ease with which a note can be counterfeited" (J.S. 16-17 n.10); its reliance on the fact that government officials have not used the purpose and forum provisions in enforcing the statutes (J.S. 14 n.9; *compare Wagner v. Simon*); and its statement that *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114 (1981), "strikes at the very heart of [Time's] claims" (Mem. in Opp. 20; *compare* App. Br. 24 n.16).

facially unconstitutional because it creates a content-based standard that is also unconstitutionally vague.

The district court cogently explained that:

> "Section 504's concern with 'philatelic, numismatic, educational, historical, or newsworthy' purposes is constitutionally impermissible. Governmental action that regulates speech on the basis of its subject matter " 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.' " *Police Department of the City of Chicago v. Mosley*, [408 U.S. 92, 99 (1972)]. In enforcing § 504 the government decides whether the purpose of the illustration is 'philatelic, numismatic, educational, historical or newsworthy' and whether the forum in which it appears is indeed an article, a book, a journal, a newspaper or an album. Such decisions are based on content or subject matter. Succinctly put, § 504 requires judgments about the nature and quality of the message contained in the illustration, about the nature and quality of the article to which the illustration relates, and about the nature of the forum containing the illustration, types of judgment the First Amendment prohibits the government from making. *Cohen v. California*, 403 U.S. 15, 24 (1971); *Thornhill v. Alabama*, [310 U.S. 88 (1940)]." (J.A. 149.)

In addition, when measured against the standards reaffirmed in *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 622 (1976), § 504(1) is unconstitutionally vague. As the district court noted, "[i]t has long been recognized that time, place and manner regulations which vest in law enforcement authorities the capacity for discretionary enforcement or subjective definition of an offense are instruments for censorship" (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *Heffron v. ISKCON*, 452 U.S. 640 (1981)) (J.A. 151-52, footnote omitted). "The determination of what is 'philatelic, numismatic, educational, historical, or newsworthy,' " the district court observed, "is rife with assumption and open to varying interpretation," and "[t]he definition of a journal, newspaper or album is anyone's game to play" (J.A. 151). In addition, the

"vice of vagueness" in § 504(1) is starkly illustrated by the constructions adopted by the agencies that enforce the statute (*see* pp. 4, 6 n.6, 13 n.15 *supra*, and pp. 37-39 *infra*), culminating in an interpretation requiring that the illustration not be "decorative" or "eye-catching" and be accompanied by "numismatic, educational, historical or newsworthy" information relating to the specific Federal Reserve Note pictured (J.A. 33, 49, 62). This effectively obliterates the narrow exemption that § 504(1) theoretically affords.

The Government proposes to cure these defects by offering for the first time in this Court a "narrowing construction" of § 504's purpose and forum requirements. However, its suggestion that the purpose and forum requirements be read to require only that the illustration appear in a "publication" is contrary to the language of the statute, is unrelated to any purpose Congress appears to have considered, still lacks any reasonable nexus with the goal of prevention and detection of counterfeiting, and still leaves § 504(1) banning Time's illustrations and those of others such as the political protester in *Wagner v. Simon*.

The deficiencies in § 504(1) underscore the basic constitutional offense of the statutory scheme challenged in this action. Rather than seeking in the first instance affirmatively to define those "likenesses" of money which might realistically imperil the integrity of the currency, almost 120 years ago Congress hastily enacted a broad negative—a blanket prohibition whose objectives are by now thoroughly obscure. Ninety-four years later, instead of attempting to correct the fundamental problem by repealing the statute and starting again, Congress chose to engraft upon the ban a series of poorly constructed and unconstitutional exceptions, borrowed from the customary practices of the Treasury Department. Thus, even though the First Amendment ensures that all speech is permitted except that which is expressly and justifiably forbidden, the premise of the present statutory scheme is exactly contrary: all use of a particular expressive symbol is prohibited except that which the Government allows.

The solution to the constitutional infirmities presented in this case is not judicial manipulation of two indefensible statutes. Rather, elimination of the problem lies in new legislation that Congress plainly knows how to write. The current law prohibits speech which does not impinge upon the Government's interest in prevention of counterfeiting, and regulates such speech as the Government allows based upon criteria which bear no substantial relation to the fulfillment of that interest. The statutes in question were thus properly struck down in the court below.

ARGUMENT

This is not a case involving a challenge to the power of Congress over the monetary system or the authority of Federal law enforcement agencies to seize paraphernalia used, fitted, or intended to be used for counterfeiting. Nor is this a case involving the Government's right reasonably to regulate activity occurring on its property.

This is also not a case in which Time asserts it has the "absolute right" to print illustrations of currency in any manner which it chooses, although Time probably does have an "absolute right" to print illustrations of currency or anything else in any manner which it chooses, unless the Government can explain why it should not.

What Time does assert is that a law that purports to control the editorial content of its magazines—including a law appearing in the anti-counterfeiting sections of Title 18 that restricts the opportunity to illustrate currency—must satisfy the constitutional standard for regulatory statutes impinging upon freedom of expression. This case involves the First Amendment right to use a potent visual symbol, one that is both intended and understood as a vehicle for the communication of ideas, in the absence of any showing that the uses Congress has prohibited pose a substantial risk to the fulfillment of a compelling government interest.

Moreover, this suit does not concern the Government's power to detect and punish criminals like the persons described

in the Statement of Deputy Assistant Secretary of the Treasury Robert E. Powis on H.R. 4275 (J.S. App. 40a-43a), or mentioned in the Government's Brief (*e.g.*, at 21 n.15, 35 n.26). Each of these criminals could be prosecuted without resort to § 474 ¶ 6 under the several sections of Chapter 25 that outlaw counterfeiting (*see* pp. 27-28 nn.22, 24 *infra*).

This lawsuit is exclusively concerned with the scope of the Government's power to ban the publication of pictures.

Faced with the obvious constitutional problems in defending this statutory scheme, the Government has now turned its focus from the pictures which are at the heart of this case to the plates and negatives created during the process of producing the illustration. The only indication of Congress's concern with such materials is in § 504(1)(iii), which requires the destruction of plates and negatives after use. In fact, the legislative history shows that the central concern of Congress in § 504(1) was with "illustrations" and their capacity to defraud. *See* S. Rep., *supra*, at 5-6.

But even if the focus is on the plates and negatives the statutes cannot survive scrutiny under the standards applied to regulations infringing protected speech. The lines drawn by the statutes in issue simply do not pass muster under

> " . . . the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential. These prerequisites are absent here." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975).

A. The First Amendment Interest at Issue.

The image of money is a vital tool of contemporary visual journalism primarily because of its unique value as a symbol of so many matters of public concern, from problems of inflation and monetary policy, to debates over the Federal budget and the allocation of public funds, to the salaries of motion picture

stars and corruption in big business and sports. Precisely because a picture of a dollar may be used artistically to embrace such an enormous range of subjects, and serves graphically to depict so many phenomena, such as inflation, the image of currency is an expressive symbol for which there is no adequate substitute. The statutory prohibition on its use thus deprives print journalists of an important vehicle of comunication, and of competition for attention in the marketplace of ideas—a marketplace in which broadcast media are free of similar constraints.

In defense of the statutory scheme, the Government first denies that there is a significant First Amendment problem at all; it claims that a ban on illustrations of money "does not implicate the central concern of the First Amendment", because it does not prohibit "the substance of any message appellee wishes to convey" (App. Br. 20). The Government's position is that as long as the press is free to print stories about the economy, it may be prevented from using the symbol of money, the most effective of all symbols of economic conditions, in those stories. However, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen v. California,* 403 U.S. at 26.[18] Absent a "justifiable interest in regulating speech . . . governmental bodies may not prescribe the form or content of individual expression". *Id.* at 24; *see Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 533-35 (1980). It is precisely because "one man's vulgarity is another's lyric" that the Constitution "leaves matters of taste and style so largely to the individual". *Cohen v. California,* 403 U.S. at 25.

The Government's position also overlooks the fact that the symbol of money is chosen precisely because it is simple, powerful and easily understood; in short, because its communicative and emotive impact is so great. In the marketplace of ideas it is often not the bare exposition of the idea but the clothing in which the speaker chooses to present it which "sells"

[18] Indeed, this warning is particularly apt here given the Government's later attempt to justify § 474 ¶ 6 as a measure to protect the "integrity" of a national symbol (App. Br. 23-24).

it to the listener. This choice is also protected by the First Amendment:

> "Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." *Id.* at 26.

It is also not a defense of this statutory scheme to suggest that the use of a powerful expressive symbol by Time or anyone else can be suppressed because, in the Government's view, the idea it represents may be voiced another way. This Court rejected that argument "summarily" in *Spence v. Washington*, on the strength of the forty-year-old observation that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " 418 U.S. at 411 n.4 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); *accord Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981); *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 556 (1975); *Thornhill v. Alabama*, 310 U.S. at 105-06. If the statutes Time challenges are valid, it cannot be because the Government thinks that Time ought to be able to convey the news another way.[19]

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[19] *See* Cox, *The Supreme Court, 1979 Term—Foreword*, 94 Harv. L. Rev. 1, 50 (1980); Henkin, *The Supreme Court, 1967 Term—Foreword*, 82 Harv. L. Rev. 63, 79 (1968). The Government's position is inconsistent with the undisputed facts as well as with the Constitution. For, while the Government seems to suggest that Time could as easily put across its editorial message by printing other illustrations, the Government has failed to controvert the sworn judgment of Time's editors and art directors that it could not do so (Aff. of Henry A. Grunwald, ¶¶ 10-11 (J.A. 75); Aff. of Gilbert Rogin, ¶ 7 (J.A. 84); Aff. of Ray C. Cave, ¶¶ 5-9 (J.A. 89-90); Aff. of Rudolph Hoglund, ¶¶ 3-6 (J.A. 96-97); Aff. of Ronald N. Campbell, ¶¶ 4-6 (J.A. 102-03)).

Indeed, what the statutory scheme really amounts to is an abridgement of the rights of editors and publishers to exercise editorial control and judgment over the material they publish. "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Miami Herald*

In short, a significant First Amendment interest is implicated by the Government's total ban on the use of a particularly evocative symbol.

B. Section 474 ¶6 Is Unconstitutionally Overbroad.

1. Section 474 ¶6 is not drawn with the required specificity.

The standards against which the statutory prohibition must be measured are simple and familiar. A statute which impinges on freedom of expression must further a sufficiently substantial government interest, and "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity", *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967), quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963).[20] As Justice Murphy observed long ago, blanket prohibitions may be "more convenient to the law maker", and "easier to fashion" than regulatory measures tailored to afford adequate protection to the public welfare without suppressing legitimate expressive conduct. *Martin v. City of Struthers*, 319 U.S. 141, 151 (1943) (concurring opinion). But that cannot justify indiscriminate abridgment of freedom of speech, for the First Amendment commands that a statute be "narrowly drawn to cover the precise situation that calls for remedial action". *Id.* at 149 (quoting *Thornhill v. Alabama*, 310 U.S. at 105).

Equally fundamental is the proposition that the means adopted to achieve a legitimate governmental end must directly promote the objective in view, and entail no greater intrusion upon First Amendment freedoms than is necessary to further the public interest asserted. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980),

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[20] *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633, 637 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. at 620; *Police Department v. Mosley*, 408 U.S. at 98-99; *Gooding v. Wilson*, 405 U.S. at 522; *Zwickler v. Koota*, 389 U.S. 241, 250 (1967); *United States v. Robel*, 389 U.S. 258, 264-66 (1967); *Aptheker v. Secretary of State*, 378 U.S. at 508; *NAACP v. Alabama*, 377 U.S. 288, 307 (1964); *Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943); *Cantwell v. Connecticut*, 310 U.S. at 310-11.

and cases cited therein. The classic statement of this requirement is in *Shelton v. Tucker:*

> "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." 364 U.S. 479, 488 (1960) (footnotes omitted).

Viewed in the light of these basic principles, § 474 ¶ 6 cannot withstand constitutional scrutiny.[21] While not "aimed" at speech, the statute directly and dramatically abridges the freedom to communicate by means of a symbol unique in its capacity to convey certain ideas. And in an area where the Constitution demands that regulatory statutes be narrowly drawn to further the Government's ends without unnecessary intrusion upon protected expression, the means adopted here lurch widely and erratically far off the mark. In the name of the legitimate goals of prevention and punishment of counterfeiting, § 474 ¶ 6 bans the execution and publication of pictures that pose no conceivable danger to the public interest pursued, and that are unmistakably intended and necessarily understood solely as instruments for the communication of ideas.

As the district court found, the prohibition imposed by § 474 ¶ 6—which "casts its net over any and all likenesses of . . . currency, whether or not any given likeness has the capacity to deceive or to act as a vehicle for counterfeiting" (J.A. 146)—is not drawn with the specificity required to avoid unnecessary intrusion upon protected speech:

> "Neither the illustrations of money used by plaintiff nor the plates used to print those illustrations can be used to

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[21] The Government claims that the constitutionality of § 474 ¶ 6 cannot be considered apart from § 504(1) (App. Br. 19). However, it also claims that if § 504(1) is unconstitutional, § 474 ¶ 6 can stand alone as a constitutional regulation of free expression (*id.* 35-36). We consider the infirmities of § 474 ¶ 6 separately to demonstrate that the Government's latter claim is untenable. As we show, pp. 34-35 *infra*, even the combination of § 504(1) and § 474 ¶ 6 is unconstitutional.

> counterfeit money, or as counterfeit money. To criminalize illustrations such as those employed by plaintiff that have no utility for fraud or forgery and that cannot be used for counterfeiting, but which do serve as vehicles for artistic or journalistic expression, violates the First Amendment by interfering unduly with protected speech. There are less intrusive ways to combat counterfeiting without totally removing illustrations of money from the national discourse." (J.A. 146, footnote omitted.)

Both the massive overbreadth of § 474 ¶ 6 and the expressive significance of the conduct it condemns are best appreciated not by hypothetical examples, but by the actual applications of the law—*e.g.*, to the distorted, discolored, fragmented magazine illustrations published by Time. The statute has also been found to justify the confiscation by the Secret Service of a three-foot-long poster of a Federal Reserve Note that had been doctored to appear as a "$30" "Inflationary Note" with a picture of former President Richard Nixon in the center, and had been executed by the artist, Gale Wagner, as a political statement on Mr. Nixon's economic policies and his involvement in the "Watergate" affair. *Wagner v. Simon,* 412 F. Supp. 426 (W.D. Mo. 1974), *aff'd,* 534 F.2d 833 (8th Cir. 1976). The criminalization of such artwork under an anticounterfeiting law surely lends new meaning to the concept of "broadly prophylactic" regulation of protected expression. *See, e.g., Schad v. Borough of Mt. Ephraim,* 452 U.S. at 70; *NAACP v. Button,* 371 U.S. at 438.

The Government contends that § 474 ¶ 6 cannot be more narrowly tailored because the statute is aimed not only at punishing counterfeiters but is also designed to "facilitate the government's efforts at *detecting* and *investigating* counterfeiting activity" (App. Br. 21, emphasis in original). Striking down § 474 ¶ 6, warns the Government, will seriously hamper law enforcement officials because counterfeiters will "conceal their criminal conduct by associating with legitimate print shops, thereby availing themselves of an instant alibi" (App. Br. 21).

This dire prediction notwithstanding, § 474 ¶ 6 is hardly the linchpin of the Government's efforts against counterfeiting in this country. The Government possesses an enormous sweep of authority under the remaining sections of 18 U.S.C., Chapter 25 (§§ 471-509) to investigate, detect and punish counterfeiting of all types.[22] Interestingly, the Government parades statistics before this Court concerning the magnitude of counterfeiting activity in this country (App. Br. 21 n.15), but sheds no light on the question whether the effectiveness (or ineffectiveness) of the Government's anticounterfeiting efforts has anything to do with the existence or scope of § 474 ¶ 6, the particular statute challenged here.[23]

The Government also asserts that prohibition of "unauthorized impressions" is necessary because it "permits Secret Service investigators to assume that anyone in possession of negatives or prints of United States currency may be engaged in illegal counterfeiting activity" (App. Br. 21-22 n.15). This justification is doubly problematic. First, the argument begs the question: It is by no means clear that such an assumption is in

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[22] For example, it remains a crime to forge, counterfeit or alter any United States obligation with intent to defraud, 18 U.S.C. § 471; to pass, utter, publish or sell (or attempt to pass, utter, publish or sell), or to import, possess or conceal a forged, counterfeited or altered obligation with intent to defraud, § 472; or to buy, sell, exchange, transfer, receive or deliver any forged, counterfeited or altered obligation with the intent that the same be passed, published or used as true and genuine, § 473. Section 474 ¶ 4 makes it a crime for anyone to possess, with the intent to forge or counterfeit, a plate, stone, or other thing (including photographic negatives) which resembles plates used to make currency. *See United States v. Dixon*, 588 F.2d 90, 91-92 (4th Cir. 1978). Thus the Treasury Department has ample means to arrest would-be counterfeiters before they strike. The intent requirement is not a difficulty since unlawful intent may be proved by the totality of the circumstances, as it is in prosecutions for the sale or possession of other types of contraband, *e.g.*, drugs. Section 474 ¶ 4 thus makes the obvious and common sense distinction between the editors of TIME Magazine and producers of flash notes (*see* J.S. App. 41a-43a), something which the Treasury Department seems unable to do.

[23] In fact, since the criminal conduct reached by § 474 ¶ 6 is already reached by other statutes, *see* n.22 *supra*, the statistics would seem to be irrelevant.

any way legitimate. Surely mere possession of the negatives used to create Time's covers, depicting distorted illustrations of currency, cannot reasonably lead to the inference that they are to be used for counterfeiting.

Second, the theory that anyone simply possessing negatives may be assumed to be engaging in counterfeiting is unsupportable under the current combination of § 474 ¶ 6 and § 504(1). Considering § 504(1), possession of negatives prior to their use, if not punishable under § 474 ¶ 4, is illegal *only* if (a) the *illustrations* are not destined to appear in "articles, books, journals, newspapers, or albums"—a fact impossible to know in advance; (b) the illustrations will not be used for "educational, historical or newsworthy purposes"—another fact impossible to know in advance; and (c) the illustrations will be published in color—which cannot be determined from the negatives since black-and-white illustrations can be made from four-color negatives. Thus, as presently written, the law cannot possibly serve the purpose the Government has manufactured for it, even were that purpose legitimate, which, as shown above, it clearly is not.

What the Government does have a legitimate interest in is identifying and punishing persons who possess photographic negatives with the intent to use them in counterfeiting. This is already independently punishable under 18 U.S.C. § 474 ¶ 4, whose constitutionality has not been questioned by Time.

Hence, all the criminal activity with which the Government has now professed special concern is separately punishable under other provisions of Title 18.[24] Section 474 ¶ 6, far from

[24] For example, in each of the cases noted in the Treasury Department Statement reproduced in the Jurisdictional Statement (J.S. App. 40a-43a), existing counterfeiting statutes other than § 474 ¶ 6 would be adequate to prosecute the counterfeiters apprehended. In each case large amounts of counterfeit bills produced by each defendant were seized, indicating an intent to sell or pass those bills for an unlawful purpose. Moreover, there is no suggestion made by the Government here that § 474 ¶ 6 would be required to prosecute those individuals. Nor does the Government suggest that § 474 ¶ 6 would be required to prosecute or apprehend the watchmaker who turned actual $5 bills into $20 counterfeits (App. Br. 35 n.26). Section 471 adequately covers that watchmaker's activity.

being a necessary component of the Government's battle against counterfeiting, is no more than a fifth wheel, and an unconstitutionally overbroad one at that. Indeed, the fact that the Government's legitimate enforcement goals are already achieved through the other provisions of Chapter 25 is proof positive of a less restrictive alternative to § 474 ¶ 6—that alternative is the set of statutes Congress has already enacted into law.

2. Section 474 ¶ 6 is not a valid means of protecting the "integrity of the Nation's currency system".

The Government asserts that its "interest in preserving the integrity of the monetary system . . . extends beyond a concern with counterfeiting" (App. Br. 22). However, the Government has so far failed to identify this separate interest, although it admits that it is not a "copyright" interest (*id.* 24 n.16), nor an interest in requiring "respect" for the currency (*id.* 25).[25]

Certainly the Government cannot assert that the physical integrity of its "property"—the creation and disposition of the dollar bills issued by the Treasury Department to serve as the nation's circulating medium—is at stake, beyond the concern with counterfeiting. Rather, the Government must be asserting a right to regulate illustrations of this "property" in order to protect its "integrity".

The legislative history of § 474 ¶ 6 offers no support for this integrity-beyond-counterfeiting theory. While there is no direct evidence as to the congressional intent in enacting § 474 ¶ 6, the circumstantial clues that exist indicate that this section was intended solely to prevent and punish counterfeiting. (*See*

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[25] At one point the Government was asserting just such an illegitimate objective (Mem. in Opp. 8). That, of course, could not withstand scrutiny. It has been settled for half a century that neither the Congress nor the legislature of any state may select the symbols to which the inhabitants of this country must pay their respect. *See, e.g., Schacht v. United States*, 398 U.S. 58 (1970); *Street v. New York*, 394 U.S. 576 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931).

pp. 6-7, *supra.*) Far from undertaking in 1864 to sanctify the visual image of Federal notes as the symbol of the Nation's exclusive circulating medium—which did not, of course, exist for bank notes manufactured by private printing firms circulated as currency in many states—Congress specifically acted to preserve the rights of their private owners to the plates, inks, colors and pigments by which Federal obligations were made. *See Globe, supra,* at 3209 (remarks of Rep. Davis); *id.* (remarks of Rep. Brooks); *id.* at 3289. The notion that the ban now embodied in § 474 ¶ 6 was in any way intended by its draftsmen to enshrine the symbol of money as the unencroachable property of the Federal Government is, at best, fanciful.

Whatever the Government means by its asserted right to protect the "integrity" of the currency, it derives its argument from its claimed ownership of the design and appearance of the currency. Its theory requires the Court to accept that "the design and appearance" of Federal Reserve Notes are sufficiently like real property of the Government to warrant similar treatment for First Amendment purposes, and that, *by virtue of the fact of ownership,* " 'the government may bar . . . certain speech' " (App. Br. 24). However, the "property" cases relied upon by the Government—*Adderley v. Florida,* 385 U.S. 39 (1966), *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), *Greer v. Spock,* 424 U.S. 828 (1976), and *United States Postal Service v. Council of Greenburgh Civic Associations,* 453 U.S. 114 (1981)—cannot be analyzed apart from the specific issues and facts presented to the Court in those cases. Those decisions all are grounded in the "public forum" concept, and the Government agrees that those cases are not on point here (App. Br. 24 n.16). The Government does seem to believe that it can derive from these cases some measure of additional power to regulate property because of its being the owner (*see id.* 14, 24).

This Court, however, has never held that the fact of Government ownership of the property in question in any way increases the Government's power to regulate it with respect to

expressive activity. Rather, public places—public parks, streets, sidewalks and fairgrounds, all of which are "in a very real sense the 'property' of the government,"—are presumptively public forums. To restrict expressive conduct there, the Government must not only advance a significant interest, it must demonstrate that it is furthering that interest by content-neutral and otherwise narrowly tailored means that leave open ample alternative channels of communication.[26]

The reservation added by *Adderley v. Florida*, 385 U.S. at 47-48, and its progeny (*Greer, Lehman, Greenburgh*) is that there is no merit to "an argument [that] has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please". The speaker who wishes to make public property a public forum cannot defeat all time, place and manner regulations merely by noting that he is on public property. *Adderley* and its progeny hold that the Government can rebut the presumption that public property is a public forum by showing that the particular place in question has not "traditionally served as a place for free public assembly and communication of thoughts by private citizens," *Greer v. Spock*, 424 U.S. at 838, that is, the speech "would disrupt the legitimate governmental purpose for which the property has been dedicated", *Consolidated Edison v. Public Service Commission*, 447 U.S. at 538.

The lesson to be learned from the public forum cases is that the Government may only regulate speech on its property if it can show that a sufficiently strong interest is jeopardized—the same requirement as for regulations impairing speech generally. But the creation of distorted, or oversized or

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[26] *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981); *Heffron v. ISKCON*, 452 U.S. 640, 647-48 (1981); *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Gregory v. City of Chicago*, 394 U.S. 111 (1969); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969); *Cox v. Louisiana (Cox II)*, 379 U.S. 559, 562-64 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963); *Cantwell v. Connecticut*, 310 U.S. at 304; *Thornhill v. Alabama*, 310 U.S. at 105; *Schneider v. State*, 308 U.S. at 162.

obscured illustrations of currency in no way endangers, interferes with or is inconsistent with the function of that currency.

Even the rule that the Government derives from the public forum cases—that the uses to which Government property is dedicated may outweigh the public's interest in using that property for expressive purposes (App. Br. 24 n.16)—does not change the analysis of § 474 ¶ 6. The cases the Government relies on require it to demonstrate that the expressive use will be inconsistent with the Government's own. That it has not done, nor could it.

According to the Government, its property involved here is the design and appearance of its obligations or securities. The use to which they are being put, communicating ideas of public concern, is not inconsistent with, or disruptive of, the "dedicated" use of currency as a medium of exchange. Indeed, since only distorted illustrations of the currency are used by Time, at most this property serves as a "model" for the illustrator or photographer, and there is no inconsistency with its purpose as currency other than an obvious concern with counterfeiting. In short, Time's use of the currency in no way affects "the governmental interest in preserving its 'property' for the use to which it was dedicated" (App. Br. 24 n.16).

Finally, the Government asserts that "like laws that regulate the use of the flag, Section 474 ¶ 6 may properly be viewed as simply restricting the uses to which the government's 'property' may be put" (App. Br. 23). Again, this statement ignores the constitutional limitations on such restrictions when they affect protected speech. Even where the national flag is involved, governments must adhere to these limitations.[27]

Nor is the regulation of our nation's flag analogous to the regulation of illustrations of currency. Reproductions of the national flag are flags themselves by act of Congress. 18 U.S.C.

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[27] Flag desecration statutes are not above constitutional suspicion. *See, e.g., Street v. New York; Spence v. Washington; see generally* Ely, *Flag Desecration: A Case study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482 (1975).

§ 700(b). Illustrations of currency that lack a capacity to deceive, however, are not actual currency and cannot be treated as if they were actual dollar bills for purposes of regulating their creation and use.

Certainly the Government may preserve the integrity of public property by preventing its physical destruction. For example, the First Amendment does not prohibit the Government from punishing those who would deface the Lincoln Memorial. *See Smith v. Goguen*, 415 U.S. 566, 587 (1974) (White, J., concurring). However, a statute that, in the interest of protecting the Memorial's "integrity", prohibited the photographing of the Memorial or defacing of a plastic model of the Memorial, could not withstand consitutional scrutiny. That is the appropriate analogy to § 474 ¶ 6.

Thus, the assertion that the design of currency is government property does not add anything to the Government's efforts to advance an interest sufficient to support the statute. Section 474 ¶ 6 was correctly struck down by the district court as a constitutionally overbroad statute.

C. Title 18, U.S.C. § 504 Does Not Relieve the Constitutional Infirmity of § 474 ¶ 6 and Is also Independently Unconstitutional on its Face.

Since 1958, the ban on execution of "likenesses" of currency has been modified by § 504(1) to permit "illustrations" of paper money and other obligations and securities of the United States (and the preparation of plates therefor) only if the illustrations meet certain purpose, forum, color and size requirements. (*See* pp. 8-9 *supra*.)

The principles by which to test the lines drawn by § 504 are well-settled. Their application to the language of the statute demonstrates its glaring failure. The Government is fully aware of this, and has beat a hasty retreat from attempting to justify § 504(1) as drafted. It is not a valid time, place and manner regulation. Moreover, it is unconstitutionally vague. Certainly it cannot relieve the massive overbreadth of § 474 ¶ 6.

1. Section 504 cannot save §474 ¶ 6.

The combination of § 474 ¶ 6 and § 504(1) does not salvage the statutory scheme from Time's overbreadth challenge. The required nexus of governmental ends and statutory means which this Court has consistently required of police regulations intruding upon freedom of speech (*see* pp. 24-25 *supra*) cannot be satisfied by the arbitrary and eccentric statutory scheme governing publication of illustrations of currency. This point is most succinctly established by reference to this Court's decision in *Village of Schaumburg v. Citizens for a Better Environment*, which struck down a prohibition of door-to-door solicitation for charitable organizations which did not demonstrate that at least 75% of their receipts were directly used for charitable purposes. This Court agreed with the courts below that the issue in the case was "whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech", 444 U.S. at 633. Furthermore, the Court agreed that the 75% test was "a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect", *id.* at 636. Finding that the interests asserted by the Village were "indeed substantial" (protecting the public from fraud, crime and undue annoyance), but were "only peripherally promoted" by the 75% requirement, and "could be sufficiently served by measures less destructive of First Amendment interests," *id.*, the Court affirmed the summary judgment of facial overbreadth.

Like the *Schaumburg* ordinance, the arbitrary requirements for exemption set forth in § 504(1) cannot relieve the constitutional infirmity of § 474 ¶ 6. Section 504(1) simply perpetuates the ban on all pictures of currency which fail to satisfy a list of ill-considered requirements as to size, color, forum and purpose. Consideration of the kinds of illustrations which this statutory scheme condemns reveals that Congress has indiscriminately "lumped together" pictures that might pose a risk to public welfare with those that positively cannot, failing "to employ more precise measures to separate one kind from the other", as the Constitution requires. *See* 444 U.S. at 637.

Thus, Gale Wagner's oversized black and white artwork criticizing President Nixon was senselessly denied exemption under § 504(1) solely because it did not appear in an "article, book, journal, newspaper or album". Similarly, a black and white likeness of a fragment of currency—for example, the photograph of the center portrait of George Washington on a $1 bill which appeared, surrounded by a life preserver, as an inside illustration in TIME Magazine (J.A. 15)—is arbitrarily banned because that fragment appeared roughly true-to-size. By the same token, drastically off-size magazine illustrations of portions of money in any color (J.A. 13, 19, 21, 23, 39) are arbitrarily proscribed because they are not in black and white. In a word, there is no logical relationship, much less a substantial relationship, between the scope of the prohibitions imposed by these statutes and the protection of public safety: most of the illustrations condemned by these Federal laws are no more likely to threaten the public welfare through use in counterfeiting than those arbitrarily allowed.

The obvious deficiencies in the language and structure of the exemption in § 504 serve only to add additional insult to the principal constitutional injury caused by § 474 ¶ 6. For the reasons set forth above, Time submits that the wholesale legislative default embodied in this statutory scheme may no longer be permitted to persist in the penal code of the United States.

2. Section 504 creates an impermissible content-based standard for permitted speech.

It is axiomatic that "time, place and manner regulations must be 'applicable to all speech irrespective of content' ". *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 536 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. at 209); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516-17 (1981); *Heffron v. ISKCON*, 452 U.S. at 648. Government regulation in the interest of public safety or welfare which describes permissible speech in terms of subject matter " 'slip[s] from the neutrality of time, place, and circumstance

into a concern about content' [which is] never permitted". *Police Department v. Mosley,* 408 U.S. at 99 (quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana,* 1965 Sup. Ct. Rev. 29); *see Consolidated Edison Co. v. Public Service Commission,* 447 U.S. at 536.

Section 504(1), limiting permitted illustrations of money to those serving "newsworthy", "historical" or "educational" purposes, self-evidently violates these principles. Whatever the words may mean to any given person at any particular time, the inquiry whether an illustration is "newsworthy" or "educational" can only be answered on the basis of a judgment about the content of its message. This judgment cannot be the Government's to make. *See Consolidated Edison Co. v. Public Service Commission,* 447 U.S. at 537-38 ("[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating . . . .' ").

3. Section 504 is also void for vagueness.

The requirements of § 504 are also impermissibly vague. The concept that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes", *Hynes v. Mayor of Oradell,* 425 U.S. at 620 (quoting *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939)), has long been recognized to carry special force when applied to a statute inhibiting expression. "[A] man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith v. California,* 361 U.S. 147, 151 (1959), *quoted in Hynes,* 425 U.S. at 620; *see Cramp v. Board of Public Instruction,* 368 U.S. 278, 287 (1961).

In addition, the vagueness doctrine has the special office in the First Amendment context of minimizing the risk of arbitrary and discriminatory application of criminal statutes by law enforcement officials and triers of fact. *Smith v. Goguen,* 415 U.S. at 572-74; *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Indeed, this Court has recently recognized that:

> "the more important aspect of vagueness doctrine 'is . . . the requirement that a legislature establish minimal

> guidelines to govern law enforcement'. . . . [W]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections' ". *Kolender v. Lawson,* 103 S. Ct. 1855, 1858-59 (1983) (quoting *Smith v. Goguen,* 415 U.S. at 574-75).

Lack of narrow, objective standards in "time, place and manner" regulations gives law enforcement officials "effective power" to grant or deny permission to speak based upon arbitrary and subjective judgments, *Hynes v. Mayor of Oradell,* 425 U.S. at 622; such regulations are instruments for censorship and arbitrary suppression of expressive activity and are thus void on their face. *Cox v. Louisiana (Cox I),* 379 U.S. 536, 556-58 (1965); *Staub v. City of Baxley,* 355 U.S. 313, 322 (1958); *Cantwell v. Connecticut,* 310 U.S. at 305; *Schneider v. State,* 308 U.S. at 163; *Hague v. CIO,* 307 U.S. at 516; *Lovell v. City of Griffin,* 303 U.S. at 451.

The statutory limitation of permitted currency illustrations to pictures which serve unspecified "educational, historical, or newsworthy" purposes confers upon the Government unconstrained authority to determine the reasons for which the speech regulated by § 504 will be allowed. Without a legislative definition of these operative statutory words the risk of prosecution necessarily turns on the subjective definitions favored by the Secret Service and the Department of Justice, and the risk of conviction similarly turns on the subjective determinations of judges and juries as to the nature of educational, historical or newsworthy messages. *See Smith v. Goguen,* 415 U.S. at 575. Moreover, even the "forum" requirements suffer from vagueness, for as the district court put it, "[t]he definition of a journal, newspaper, or album is anyone's game to play". (J.A. 151).

The constitutional hazards of arbitrary enforcement have in fact been realized in the interpretations of § 504 by the agencies charged with its enforcement. While delivering complaints and warnings to Time, Secret Service agents and

Treasury Department officials conveyed substantially inconsistent instructions as to the nature of the pictures which Time may publish. In some cases, Time was warned that no color "likeness" of any portion of currency may appear in its magazines—regardless of the size or medium of the illustration—but that black and white "likenesses" are permissible so long as they conform to the size requirements set forth in § 504(1) and appear for a purpose approved by the statute. On another occasion, however, Time was instructed by the Assistant Legal Counsel of the Secret Service that photographs of any portion of currency are completely prohibited, regardless of size, color or purpose, because a photograph is not an "illustration" within the meaning of § 504(1). More recently, Time has been admonished that, in the view of the Treasury Department, (i) all representations of any currency are prohibited, regardless of size, color or medium of illustration, unless accompanied by "numismatic, educational, historical or newsworthy" information relating to the specific Federal Reserve Note pictured, and (ii) illustrations of money intended primarily for "decorative or eye-catching purposes" may not be used at all. (J. A. 33, 35, 49, 62.)

This last interpretation of the statute effectively obliterates the § 504(1) exemption. Under this view, one may publish only pictures of specific dollar bills that might by some quirk prove to be of public interest, and truly newsworthy stories about the role of money in our society may not be illustrated by means of the one image universally understood to represent their subject matter. Moreover, since the Treasury Department further maintained that, by definition, any "eye-catching" illustration cannot serve an "educational" or "newsworthy" purpose, virtually all magazine illustrations of currency were banned on this ground alone. Indeed, the very essence of a successful magazine illustration is its ability to grab a reader's attention by "catching eyes", and a prohibition on pictures intended for this purpose is in substance a proscription of illustrative communication itself.

While the Government now chooses to withdraw at least the most egregious of these interpretations of the statute (*see*

App. Br. 28 n.18), its concession in no way lessens the impact of the fact that such interpretations were once used. If the statutes are not struck down, the Treasury Department will remain free to formulate new restrictive interpretations.

Time submits that the Government's assurance that the statutory tests have not yet been used as vehicles for censorship of speech based on the speaker's point of view is not enough. The constitutional requirements are that a regulation constraining speech have a legitimate and substantial reason for existing, and that "time, place and manner" regulations be crafted so as to minimize the possibility of discretionary enforcement and arbitrary suppression.[28] (*See* cases cited pp. 36-37 *supra.*)

In sum, all "the vice[s] condemned in *Lovell, Schneider, Cantwell,* and *Staub*", *Hynes v. Mayor of Oradell,* 425 U.S. at 622, and their progeny have come to pass with § 504. The statute's ambiguous language has been arbitrarily and inconsistently interpreted, so that " 'men of common intelligence must necessarily guess at its meaning' ". *Cramp v. Board of Public Instruction,* 368 U.S. at 287 (quoting *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926)).

4. The Government's "narrowing construction" of § 504 does not cure its constitutional deficiencies.

In this Court, the Government attempts to save § 504 from invalidity by suggesting a "narrowing construction". While it is true that a court must attempt to construe a statute to avoid

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[28] The Government asserts that it could not individually review each illustration of currency a publisher might want to print for capacity to deceive the public, explaining that:

> "Not only would the burden of a case-by-case review impose an intolerable burden on the Secret Service, but requiring Government agents to decide in each instance whether a particular illustration has a 'capacity to deceive' (Mot. to Aff. 28) would run the risk of arbitrary and discriminatory enforcement based on the content of the message." (App. Br. 34 n.25)

No better words could describe the practice already engaged in by the Secret Service of pre-screening illustrations of currency to decide if they are of "educational, historical, or newsworthy" value (*see* J.A. 29-30, 31-32).

constitutional problems if fairly possible, it may not rewrite the statute wholesale, particularly a criminal statute. *Aptheker v. Secretary of State*, 378 U.S. at 515; *Blount v. Rizzi*, 400 U.S. 410, 419 (1971).

The Government, implicitly conceding that the Treasury Department's interpretations of § 504 have been unconstitutional (App. Br. 28 n.18), suggests that the limitation of illustrations of currency to "numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums" is "descriptive and illustrative, rather than prescriptive and mandatory" (*id.* 28). The Government now tells this Court that the purpose and forum requirements of § 504 are satisfied as long as the illustration appears in a "publication" (*id.*). This notion is completely unsupported by the statute's language and legislative history—indeed, until the Government's latest brief the Treasury Department did not support it either (*id.* 28 n.18).

Congress clearly was not willing to allow carte blanche to publications. Congress specifically adopted a limited number of permissible purposes for which illustrations could be used and a limited selection of permitted forums. The legislative record makes clear that Congress was tracking the policy of the Secretary of the Treasury in making "exceptions to the statute by granting special permission to use illustrations of [currency] for numismatic, historical, and educational purposes". S. Rep., *supra*, at 5; H.R. Rep. No. 1709, 85th Cong., 2d Sess. 3.

The Government's attempt to read out of the statute restrictions which it correctly perceives as a constitutional embarrassment is understandable. This Court, however, is not free to engage in such a wholesale revision. "[T]his Court [cannot] consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects." *Aptheker v. Secretary of State*, 378 U.S. at 515.

Even if the Government's new interpretation could be reconciled with the language and history of § 504, it would not

transform this content-oriented statute into a constitutional time, place and manner regulation of speech. Such regulations must be narrowly tailored to serve a significant governmental interest. *E.g., United States v. Grace*, 103 S. Ct. at 1707; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. at 535-36.[29] Section 504(1) as construed by the Government would still fail this test.

Notwithstanding the concededly significant interest in detecting and preventing counterfeiting, the Government has not even attempted to show how illustrations in publications (or the negatives from which they are made) are more or less likely to be used for counterfeiting purposes than other illustra-

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[29] The Government, rather than addressing the need for a sufficient "nexus between the distinctions among the various purposes and forums, on the one hand, and the statutory goal of preventing fraud and counterfeiting on the other" (App. Br. 26-27; *see* J.A. 150-51), instead argues that Time has no standing to raise this issue because it "would have no difficulty complying with a requirement that illustrations of currency must be in publications" (App. Br. 29). This contention is without merit. The Government's strategy here is to escape constitutional scrutiny of the "purpose" and "forum" requirements of § 504(1) by reading the "purpose" language out of the statute and then suggesting a construction which is still unconstitutional, but carves out an exception for publishers. But in suggesting a limiting construction, the Government must offer some showing that its new interpretation would be constitutional; otherwise one could always save an unconstitutional statute from attack by any particular plaintiff by reinterpreting the statute so as not to reach that plaintiff's particular conduct.

This strategy also flies in the face of traditional First Amendment overbreadth analysis, under which Time is permitted to challenge § 504 on behalf of those to whom the statute would be unconstitutionally applied. *See Kolender v. Lawson*, 103 S. Ct. at 1859 n.8; *New York v. Ferber*, 102 S. Ct. 3348, 3361 (1982); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. at 634; *Broadrick v. Oklahoma*, 413 U.S. 601, 612-16 (1973); *Thornhill v. Alabama*, 310 U.S. at 98. The Government acknowledges as much, but can only lamely reply that "appellee's challenge to the requirement of Section 504(1) that illustrations of currency must appear in publications does not rest on a claim that these provisions are overbroad" (App. Br. 29). We respectfully disagree. One of Time's major assertions has been and remains that § 504 continues § 474 ¶ 6's proscription of considerably more expression than is necessary to prevent counterfeiting.

tions. The appearance of a picture in a magazine as opposed to a placard has nothing to do with its utility to a counterfeiter. For example, Gale Wagner's 30-dollar bill is still outlawed by the statute under the proposed interpretation, even though it is of no conceivable use to a counterfeiter and is core First Amendment expression.

Moreover, this latest interpretation undercuts the Government's asserted justification that without the statutory scheme would-be counterfeiters would have an "instant" alibi by associating themselves with a legitimate printing operation (*see* App. Br. 21; J.S. 16-17 n.10). If illustrations are permitted as long as they appear in "publications", thereby expanding the exemption in § 504(1), the counterfeiter will now have a wider array of legitimate print shops from which to operate.[30]

Equally untenable is the Government's defense of § 504 in terms of the color requirement. Based on the factual record before it, the district court found that "the materials used to produce four-color offset magazine covers showing usually distorted illustrations of currency were of little value to someone attempting to counterfeit a hand-engraved, two-sided

[30] In addition, the Government's new interpretation attempts to escape overbreadth problems only with the result of exacerbating the statute's already existing problems of vagueness. *Winters v. New York*, 333 U.S. 507 (1948); *Smith v. Cahoon*, 283 U.S. 553, 564-65 (1931); *see generally* Monaghan, *Overbreadth*, 1981 S. Ct. Rev. 1, 17. Even though Time's activity of publishing a magazine would clearly qualify as "publication", other activities normally associated with First Amendment expression such as leaflets, posters, paintings, drawings and signs would not so clearly qualify. Time is permitted to attack § 504 as vague as applied to the conduct of other persons. *Kolender v. Lawson*, 103 S. Ct. at 1859 n.8. The Government's last-ditch effort does not define criminal conduct "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement". *Id.* at 1858. Moreover, Time itself should be able to engage in other activities related to its business without fear of prosecution, as for example, the creation of a one-page reprint of one of the *Time* covers at issue in this case or a pamphlet with a reprint of such a cover which questioned the soundness of the Government's expenditure of the taxpayers' money for prosecuting Time. Of course, neither of these could deceive the public or give aid to a counterfeiter, but it is unclear whether they are or are not "publications".

dollar bill" (J.A. 146 n.19, quoting Affidavit of Henry A. Grunwald, J.A. 76 ¶ 13). The Government now attempts to contest this factual finding by introducing evidence for the first time in this Court (*see, e.g.*, J.S. App. 40a-43a; App. Br. 21 n.15, 35 n.26).

The regulation prohibiting color illustrations is overbroad because it does not adequately focus on what is useful to a would-be counterfeiter. *See Schad v. Borough of Mt. Ephraim*, 452 U.S. at 70; *NAACP v. Button*, 371 U.S. at 438. This is dramatically illustrated by the fact that Time's covers (J.A. 13, 19-23) violate the color restrictions, yet none of them has the remotest capacity for deception or could otherwise be used to make a counterfeit. The counterfeiter would do better to start with an actual piece of currency. It is simply fantastic to suggest that illustrations depicting a basketball net filled with $100 bills, folded oversized notes crammed in a diamond money clip, a cover size George Washington with a tear in his eye, or a "landscape" of enlarged and distorted $100 bills beneath open doors, are the raw materials of counterfeiters. A Federal prohibition of illustrations such as these serves no realistic government interest. It is simply an indefensible ban upon protected speech.

Recognizing the potential reach of the color regulation, the Government adopts an alternate strategy: It asserts that "the purpose of the color restriction is to prevent the making of multiple plates or negatives" (App. Br. 29-30). Permitting use of color illustrations, argues the Government, will justify possession of "separate plates and negatives of the note, Treasury seals and serial numbers"—"a crucial step towards counterfeiting obligations" (*id.* 30).[31] Even after this restate-

[31] This argument regarding the focus of § 504(1) was not made by the Government to the district court. It is certainly not supported by the legislative history. As the congressional reports indicate, the focus of this color prohibition was to prevent "the illustrations being used as an instrument of fraud" (App. Br. 8). Indeed, the Government asserts in its Brief that § 504(1) "reflects Congress's careful attempt to balance legitimate First Amendment concerns and legitimate law enforcement concerns by permitting reproduction of photographs of currency so long as certain reasonable conditions—***designed to protect against fraudulent use of these photographs*** —are satisfied" (***id.* 26, emphasis added**).

ment of focus, the statute reaches too far. Whatever the practices of professional counterfeiters might be, all of Time's four color separations of currency contain every obscuring feature and distortion of the ultimate picture, and thus are useless to the counterfeiter.[32]

If in fact the legislative end is raw materials and not the finished illustration, then the prohibition is overinclusive. Aiming for plates and negatives, the statutes ban the finished products as well, notwithstanding the availability of a less intrusive alternative: a careful regulatory system governing production and disposal of materials from which currency illustrations are made, coupled with penal sanctions for their abuse. That alternative is already in the statute in § 504(1)(iii) which requires destruction of plates and negatives used to create illustrations. The Government's only stated problem with that system is that it cannot get "guarantees" from every printer in the United States that they will comply with the destruction requirement (App. Br. 31-32). But it cannot be that the sole tests required to pass constitutional muster are expediency of detection and lack of guaranteed adherence to other existing laws. Indeed, under the existing statutory scheme the Government enforcement agencies must face the fact that they cannot guarantee that their staffs can monitor every publication in the United States for compliance with § 504(1).

Nevertheless, the Government argues that the ban on color is constitutional because Congress thought it was necessary to protect against counterfeiting. The Government claims that "[i]t is not the proper role of the courts to appraise the wisdom of Congress' judgment in this matter, so long as the statutory provision has a rational basis" (App. Br. 31). That argument ignores the principle that when First Amendment values are implicated, it is precisely the job of the courts to scrutinize legislative regulations to ensure that there is no unnecessary

[32] The Government takes the district court to task for relying upon what it calls "self-serving representations" by Time's affiants (App. Br. 30). The Government seems to forget that it offered no countervailing evidence even though it had the burden to justify the lines drawn by the statute.

curtailment of free expression. *United States v. Grace,* 103 S. Ct. at 1708-10; *Village of Schaumberg v. Citizens for a Better Environment,* 444 U.S. at 636-39; *NAACP v. Button,* 371 U.S. at 438; *Schneider v. State,* 308 U.S. at 161. Thus, even where a challenged regulation has restricted speech "incidently or only in a small number of cases", the Court has "recognized its obligation to assess the substantiality of the justification offered". *Schad v. Borough of Mt. Ephraim,* 452 U.S. at 69 & n.7.

The Government also believes that § 504(1) should survive challenge because: "Whatever thoughts or ideas appellee wishes to express by means of an illustration of currency can be expressed through a black and white illustration."[33] (App. Br. 32-33.) Yet in the absence of any clear demonstration of a compelling justification for a restriction of pictures to those printed in black and white, the Government is not permitted to dictate to Time what kind of expression is sufficient. It is wholly antithetical to the premises underlying the First Amendment to claim that the Government may impose a restriction on expression not because the restriction is narrowly tailored to serve an important governmental interest but because, in the Government's view, the expression is not "important" or "necessary" or can be made in some other manner. This Court has rejected that position. *Spence v. Washington,* 418 U.S. at 411 n.4. Under our system of government the Government is not in the business of dictating to its citizens the "best" manner to communicate their ideas or of deciding for them which types of communications are "important" or "trivial".

In any case, Time's use of color is not a mere "aesthetic preference". It is a reasoned journalistic judgment as to the most effective manner to communicate an idea and a considered business judgment as to how to compete with other magazines, all of which use color (*see* p. 2 n.3, *supra;* J.A. 77,

[33] This argument is essentially the same as the one made earlier in the Government's Brief to justify removing the symbol of money from discourse on the grounds that the same ideas could be expressed in other ways. It betrays a complete misunderstanding of First Amendment doctrine for the same reasons. (*See* pp. 22-23 *supra.*)

84, 91-92). For a company like Time, whose business depends on attracting readers and keeping them (and attracting advertising dollars because of its demonstrated success in this market), the decision to use color illustrations as opposed to black and white is hardly trivial or whimsical. Color is used by journalists because the forces of the market demand it—a market which includes the broadcast media. In short, not only is it effective communication to use color, it is necessary to ensure a magazine's economic viability.[34]

In its final argument, the Government asks whether it is powerless to stop a publisher from printing full size, full color representations of $100 bills, as long as there is no intent to deceive (App. Br. 34). The short answer is that this case does not involve such a statute or enforcement direction by the Treasury. Time is before this Court because pictures it does publish, which cannot conceivably be confused with genuine currency, are prohibited by Federal law, and, astoundingly, Time has actually been threatened with criminal prosecution for publishing them.

To describe the facts of this case is to realize that Congress can do a much better job in preventing counterfeiting than the present § 474 and § 504. It is not Time's task, but that of the elected representatives of this country, to fashion a better statute which would pass constitutional muster. However, to imply, as the Government seems to do, that a workable counterfeiting statute cannot be drafted which can distinguish between the oversized, distorted, one-sided representations appearing on the cover of TIME Magazine and a full-size, full-color representation of United States currency is preposterous.

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[34] It is, of course, no argument to respond that a ban on color would affect all magazine publishers alike, so that there would be no problems of competition as between publishers. For the color ban only limits publishers choosing to do cover stories which in some way involve money. Thus if a publisher chooses to do a cover story on the "shrinking dollar" one week, it will still have to compete with another publication's color cover concerning El Salvador. The result is that some publishers will simply not run a cover illustration of money. The effect is to discourage publishers from illustrating money at all in reporting stories.

5. The Government's severance argument is meritless.

The Government asserts that "[t]here can be no serious dispute that Section 474 ¶ 6 and 504(1) [sic] are severable," (App. Br. 35) and that "[i]f this Court concludes . . . that [§ 504(1)] cannot be saved by judicial construction, it should sever the two statutes and invalidate only Section 504(1), while leaving Section 474 ¶ 6 intact" (*id.*). It will hardly do to sever the unconstitutionally broad ban on protected speech in § 504(1) only to leave the broader ban imposed by § 474 ¶ 6, which is, if anything, even more riddled with constitutional infirmities. Both statutes are unconstitutionally overbroad, and both must be struck down.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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UNITED STATES CONSTITUTION

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATUTES

Title 18 U.S.C. § 474 (1976) provides:

"§ 474. Plates or stones for counterfeiting obligations or securities

". . . .

"Whoever prints, photographs, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any . . . obligation or other security [of the United States], or any part thereof, or sells any such engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States;

". . . .

"Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

Title 18 U.S.C. § 504 (1976) provides:

"§ 504. Printing and filming of United States and foreign obligations and securities

"Notwithstanding any other provision of this chapter, the following are permitted:

> (1) the printing, publishing, or importation, or the making or importation of the necessary plates for such printing or publishing, of illustrations of—
>
> (A) postage stamps of the United States,
>
> (B) revenue stamps of the United States,

(C) any other obligation or other security of the United States, and

(D) postage stamps, revenue stamps, notes, bonds, and any other obligation or other security of any foreign government, bank, or corporation,

for philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums (but not for advertising purposes, except illustrations of stamps and paper money in philatelic or numismatic advertising of legitimate numismatists and dealers in stamps or publishers of or dealers in philatelic or numismatic articles, books, journals, newspapers, or albums). Illustrations permitted by the foregoing provisions of this section shall be made in accordance with the following conditions—

(i) all illustrations shall be in black and white, except that illustrations of postage stamps issued by the United States or by any foreign government may be in color;

(ii) all illustrations (including illustrations of uncanceled postage stamps in color) shall be of a size less than three-fourths or more than one and one-half, in linear dimension, of each part of any matter so illustrated which is covered by subparagraph (A), (B), (C), or (D) of this paragraph, except that black and white illustrations of postage and revenue stamps issued by the United States or by any foreign government and colored illustrations of canceled postage stamps issued by the United States may be in the exact linear dimension in which the stamps were issued; and

(iii) the negatives and plates used in making the illustrations shall be destroyed after their final use in accordance with this section.

(2) the making or importation, but not for advertising purposes except philatelic advertising, of motion-picture films, microfilms, or slides, for projection upon a screen or for use in telecasting, of postage and revenue stamps and other obligations and securities of the United States, and postage and revenue stamps, notes, bonds, and other obligations or securities of any foreign government, bank, or corporation. No prints or other reproductions shall be made from such films or slides, except for the purposes of paragraph (1), without the permission of the Secretary of the Treasury.

For the purposes of this section the term 'postage stamp' includes postage meter stamps."

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